

Hagazarian



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Cellular Products Services, Inc.--Request for Reconsideration

File: B-222614.2

Date: August 18, 1986

DIGEST

Prior decision upholding agency's cancellation of solicitation because of lack of sufficient funds is affirmed where the arguments raised by the protester in its request for reconsideration do not show that the prior decision was erroneous.

DECISION

Cellular Products Services, Inc. (Cellular) requests that we reconsider our decision in Cellular Product Service, Inc., B-222614, July 3, 1986, 86-2 C.P.D. ____, in which we held that the Department of the Interior, Bureau of Reclamation (Bureau), properly canceled a solicitation for sealed bids for roof repair at the Mt. Elbert Pumped-Storage Plant, Fryingpan-Arkansas Project (Mt. Elbert). Cellular had submitted the low bid under IFB No. 6-SI-60-01850 which was canceled as a result of the agency's determination that sufficient funds were not available to make an award. In our July 3 decision we denied the protester's request that it either be awarded the contract under the solicitation or that in the alternative it be awarded various costs claimed including the costs of preparing its bid and pursuing the protests together with reimbursement for lost profits.

We affirm the prior decision.

In its request for reconsideration the protester asserts that information which it has received from the agency by letter dated June 30, pursuant to a Freedom of Information Act (FOIA) request, shows that the agency did indeed have sufficient funds to make award under the solicitation on May 13--the date that an agency official first advised (subsequent to bid opening) that the solicitation would be canceled due to insufficient funds. Cellular has submitted copies of several documents in support of its view that contract funds were available for award of a contract under the solicitation. In a list dated May 5, 1986, of the Bureau's regional contract/purchase projects, the replacement of the roof at Mt. Elbert was

listed as requiring \$113,000 in fiscal year 1986 funds and that funds therefore were available in the amount of \$130,000. This list shows that in order of the region's priorities for such projects the roof replacement at Mt. Elbert was ranked 12th out of 13. The protester also has provided us with a copy of a Faxogram dated May 2, 1986, in which the Acting Regional Director of the Bureau of Reclamation requested that the Commissioner of the Bureau approve award of the contract for roof repairs at Mt. Elbert. The Faxogram advised the Commissioner that the anticipated award date was May 30, that the anticipated award amount would be \$113,463 chargeable to fiscal year 1986 funds and that funds in that amount were available so that no additional funding would be needed. In a Faxogram dated May 19, 1986, the Assistant Commissioner, Bureau of Reclamation, advised the Regional Director that the request for approval of the award of a contract for roof repair at Mt. Elbert was denied due to a "current shortage of funds" and the contract's low ranking in the region's priority listing of projects.

The protester contends that the documents which it has submitted clearly establish that funds to award a contract for the roof repairs were in fact available as of May 13, 1986, the date on which it was first advised that the contract could not be awarded due to funding constraints since the Faxogram denying approval of the award due to a shortage of funds was not dated until May 19.

We disagree that the record establishes that the agency did in fact have sufficient funds to permit award of the contract. The documents provided by the protester indicate that award of the contract was subject to the approval of the Office of the Commissioner and that the Assistant Commissioner denied the required approval by Faxogram dated May 19 because of a "shortage of funds" and the project's low priority. While the Faxogram denying the request for award approval was dated May 19, this does not establish that funds were in fact available for contract award at the time that the protester was first advised that sufficient funds were not available for award. In any event, as stated it appears that approval by the Office of the Commissioner was a condition precedent to the contracting officer making an award.

As set forth in our decision of July 3, an agency's determination that funds are not available is a sufficient reason to cancel a solicitation and it is not our role to question the unavailability of funds. Military Base Management, Inc., B-216309, Dec. 4, 1984, 84-2 C.P.D. ¶ 619. This is because the award of a contract without sufficient funds would constitute a violation of the Anti-Deficiency Act, 31 U.S.C. § 1241 (1982), which prohibits expenditures of contract obligations in excess of appropriated funds or apportionments made to achieve the most effective use of funds. See Viereck Co., B-219358, Aug. 23, 1985, 85-2 C.P.D. ¶ 221. Furthermore, as we pointed out in our earlier decision, the management of an agency's funds generally depends on the agency's judgments concerning which projects and activities shall receive increased or reduced funding and a contracting agency has an unquestionable legal right to cancel a solicitation when sufficient funds are not available. Somers Construction Co., Inc.--Reconsideration, B-193929, July 24, 1979, 79-2 C.P.D. ¶ 54.

The protester contends that subpart 32.7 of the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 32.7 (1984), requires that bidders should be specifically advised if the contract is subject to the availability of funds and that this was not done in this case. The protester has misconstrued the provisions of FAR, 48 C.F.R. subpart 32.7.

The provision at FAR, 48 C.F.R. § 32.702, provides in part that before executing any contract, the contracting officer shall either obtain written assurance from responsible fiscal authority that sufficient funds are available or expressly condition the contract upon availability of funds in accordance with FAR, 48 C.F.R. § 32.703-2. In pertinent part, this latter provision states that a contracting officer may initiate a contracting action properly chargeable to funds of the new fiscal year before such funds are available provided that the contract contains the clause at FAR, 48 C.F.R. § 52.232-18, "Availability of Funds", which provides that funds are not presently available for the contract and that the Government's obligation under the contract is contingent upon the availability of appropriated funds from which payments can be made. There is nothing in FAR, 48 C.F.R. subpart 32.7, which would require that an agency advise potential offerors in a solicitation that the contract award was subject to the availability of funds and which would require award to a bidder or offeror, notwithstanding lack of funds.

Accordingly, we affirm our prior decision upholding the propriety of the cancellation of the solicitation.

The protester again requests that it be awarded costs of pursuing its protest, including attorney fees, bid preparation costs, costs of performance and payment bonds and loss of profits. As set forth in our July 3 decision our regulations provide for the recovery of costs only where a protest is found to have merit. 4 C.F.R. § 21.6(a) (1986). See also 31 U.S.C.A. § 3554(c)(1) (West Supp. 1986). Since we affirm our prior decision, there is no basis upon which we may grant the protester's claim for costs. We again point out that there is no legal authority which would permit the recovery from the government of lost profits. Smoke Busters, B-219458, Nov. 1, 1985, 85-2 C.P.D. ¶ 501 and Aaron Refrigeration Services, B-217070, Apr. 17, 1985, 85-1 C.P.D. ¶ 437 at 6.

for *Seymour Efron*
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